No. 2030

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

THE MONTANA-TONOPAH MINING COMPANY (a corporation),
*Plaintiff in Error,*

vs.

R. P. DUNLAP,
*Defendant in Error.*

**Upon Writ of Error to the United States Circuit Court for the District of Nevada.**

## BRIEF FOR DEFENDANT IN ERROR.

McIntosh & Cooke,
C. H. McIntosh,
H. R. Cooke,
Tonopah, Nevada.
*Attorneys for Defendant in Error.*

*Filed this.....day of September, 1911.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

# Contents


| | Pages |
|---|---|
| STATEMENT . . . . . | 1 - 3 |
| ARGUMENT . . . . . | 4 - 15 |
| Questions involved . . . . . | 4 - 5 |
| Officer or director may recover on implied contract | 6 - 15 |
| RE: ASSIGNMENTS OF ERROR . . . . . | 15 - 26 |
| Objections to consideration herein of assignments regarding Court's instructions to jury . . . | 15 - 20 |
| Payment fixed on contingency pending which statute did not begin to run . . . . . | 20 |
| Where delay induced by defendant, statute does not run . . . . . | 20 - 26 |
| RE: CHARACTER OF EXCEPTION . . . . . | 26 - 45 |
| Nonsuit would have been improper . . . . . | 28 - 29 |

No. 2030

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

THE MONTANA-TONOPAH MINING COMPANY (a corporation),
*Plaintiff in Error,*

vs.

R. P. DUNLAP,
*Defendant in Error.*

---

**Upon Writ of Error to the United States Circuit Court for the District of Nevada.**

---

## BRIEF FOR DEFENDANT IN ERROR.

---

### Statement.

A brief summary of the case as made, and of the theory and principles upon which the same was presented and tried, may we assume be permitted on behalf of the defendant in error.

This is an action in implied assumpsit,—upon a quantum meruit,—for the reasonable value of services claimed to have been rendered to plaintiff in error by R. P. Dunlap, at Tonopah, Nevada, between on or about January, 1903, and on or about February 15, 1910, a period approximating seven years. Defendant in error alleged that the reasonable value of these services was the sum of $20,500.00 and prayed judgment for that amount. (Record, p. 2.)

During said period of seven years defendant in error was officially connected with plaintiff in error as follows: From January, 1903, until February 21, 1905, as secretary and treasurer, at an agreed salary, for his services as such secretary and treasurer, of $150.00 per month from January, 1903, to October 15, 1903, and $200.00 per month from October 15, 1903, until February 21, 1905,—at which time his incumbency of the office of secretary and treasurer ended.

From September, 1903, until February 15, 1910, as a director of the company,—and from September 11, 1906, until February 15, 1910, as vice-president of the company. During this period neither the office of director nor that of vice-president carried any salary fixed either by the charter, by-laws or any prior resolution of the stockholders or directors of the corporation.

The plaintiff in error in its answer (Record, p. 10) denied all liability for services rendered by Mr.

Dunlap,—alleging (Record, p. 12) that he performed no services for or on behalf of the corporation save those within the scope of his duties as an officer of the company;—and plead the Statute of Limitations as running from February 15, 1906;—and on the issues as thus made trial by jury was had.

On the trial, the defendant in error asserted and offered evidence tending to prove that the services rendered by him,—for the reasonable value of which this action was brought,—were services clearly beyond and outside the scope of his duties as secretary and treasurer, director or vice-president of the corporation. (Record, pp. 20, 21, 23, 24, 25, 35, 36, 37, 38, 39, 40, 41, 42, 46, 84, 85, 139, 140, 142, 143, 145, 146, 172, 178, 209, 210, 250, 254, 261, 276, 283, 284, 288.) *Particularly* Record, p. 135 and pp. 293-294,—and Record, p. 29, lines 5 and 6;—that the said services were not volunteer or gratuitous, and that both he and the company understood and expected that the same were to be compensated. (Record, pp. 58, 67, 68, 70, 98, 102, 103, 115, 116, 117, 118, 119, 120, 267, 274, 275) and *particularly* Record, p. 135 and pp. 293-294.)

The jury found a verdict in favor of defendant in error in the sum of seven thousand five hundred ($7500) dollars and the case is brought to this Court upon writ of error.

## Argument.

### QUESTIONS INVOLVED.

It will be readily observed that the only questions presented or involved in this case were:

1. Can an officer or director of a corporation recover on implied contract compensation for services by him rendered to the company, when such services are without the scope of his duties as such officer or director—are not gratuitous and are rendered under such circumstances as raise the presumption that the company knew or ought to have understood that he was to be paid for them?

2. Were the services sued upon by the defendant in error outside the scope of his official duties as an officer or director of the corporation, plaintiff in error, and if so were they gratuitous or were they rendered with the expectation on the part of both parties that they were to be paid for, or under such circumstances as raises the presumption that the plaintiff in error ought to have understood that they were to be paid for?

We maintain that both queries must be answered in the affirmative,—for

The first is sustained and conclusively settled and established beyond doubt or cavil by the great weight of modern authority, and

The second is established by the evidence, and has been affirmatively answered by the jury in full view of all that evidence,—it being the peculiar and ex-

clusive province of the jury to pass upon and determine such disputed questions of fact.

We cite:

Ruby Chief Mg. & Mllg. Co. v. Prentice, 52 Pac. 210,

wherein the Court says:

> "The evidence *tends* to show, and so the *jury must* have *found,* that the services performed were not such as devolved upon the plaintiff * * * as a director, but were clearly outside thereof, * * *. The testimony being in conflict as to these questions of fact, we must accept the verdict of the jury as conclusive."

Also:

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 405; 38 Law Ed. 493; 14 Sup. Ct. Rep. 632.

> "It was the peculiar province of the jury, under proper instructions from the Court as to the law governing plaintiff's right to recover for the services claimed to have been rendered, to determine from the evidence whether or not he was entitled to compensation therefor."

We take the liberty of assuming that the honorable Court will not disturb the verdict of a jury under conflicting evidence on disputed questions of fact, unless from that evidence it be made to appear that the trial Court committed errors of law, and then only in so far as such errors are assigned in compliance with the rule. (Rule 11.)

OFFICER OR DIRECTOR MAY RECOVER ON IMPLIED CONTRACT.

"By the overwhelming weight of authority, the doctrine that the directors and other managing officers of a corporation are not entitled to compensation, in the absence of express provision or agreement therefor,— does not apply to unusual or extraordinary services,—that is, services which do not properly pertain to their office, and are rendered by them outside of their regular duties. * * * the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth."

Clark & Marshall, Private Corporations, p. 2053, Sec. 671c.

To same effect we cite:

Morawetz, Private Corporations, Sec. 508;

10 Cyc., pp. 900-901 (5);

3 Thompson on Corporations, Sec. 4387;

2 Cook on Corporations, 6th Ed., pp. 1929 et seq., Sec. 657.

The Supreme Court of the United States has twice passed upon this question and in both decisions supported the doctrine expressed in the text quoted supra.

Fitzgerald and Mallory Construction Co. v. Fitzgerald, 137 U. S. 98; 34 Law Ed. 608 (at p. 613, last paragraph in column 2); 11 Sup. Ct. Rep. 36;

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 405; 38 Law Ed. 493; 14 Sup. Ct. Rep. 632.

The first named case is a leading case upon the subject,—and the Court, speaking by Mr. Chief Justice Fuller, says (parentheses ours):

> "To render such party liable as a debtor under an implied promise, it must be shown, not only that his services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and *ought to understand* that compensation was to be paid for them. Tested by this rule, we think that the Court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. *It could not* properly *have been held as matter of law* that *he was not* so entitled",

and at page 613, col. 2 (34 Law Ed.):

> "The Court instructs the jury that 'if Fitzgerald', the plaintiff, 'acted as superintendent, treasurer or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant' (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services were reasonably worth"—(a much broader ground than Court ventured to take in case at bar).
>
> "If strict verbal accuracy was not observed in giving this direction, in view of the general rule as to compensation for official services rendered

> in the absence of a specified compensation fixed or agreed upon, yet we do not think, taking all parts of the charge upon that subject together, that any substantial error was committed. The evidence *tended* to establish that Fitzgerald acted * * * in the discharge of duties outside of those assigned to the treasurer as such",

and then states, as per supra, that it was

> "fairly left to the jury to determine whether Fitzgerald * * * was entitled to claim compensation therefor".

This decision is cited with approval by a great majority of the cases on this subject, and we cite to same effect:

Gumaer v. Cripple Creek etc. Co., (Colo.) 2 Colo. 85; 90 Pac. 81;

Rogers v. Hastings & D. Ry. Co., (Minn.) 22 Minn. 25;

Deane v. Hodge, (Minn.) 35 Minn. 146; 27 N. W. 917;

Cheney v. Lafayette Ry. Co., (Ill.) 68 Ill. 570 (at p. 575); 18 Am. Rep. 584;

Greensboro etc. Turnpike Co. v. Stratton, (Ind.) 120 Ind. 294; 22 N. E. 247 (at p. 248, col. 2);

Santa Clara Mg. Assn. v. Meredith, (Md.) 49 Md. 389; 33 Am. Rep. 264;

Severson v. Bimetallic Extension Mg. & Mill Co., (Mont.) 44 Pac. 79;

Ruby Chief Mg. & Mill. Co. v. Prentice, (Colo.) 25 Colo. 4; 52 Pac. 210;

Citizens National Bank v. Elliott, (Iowa) 55 Iowa 104; 7 N. W. 470; 39 Am. Rep. 169 ("Third");

Huffaker v. Kreiger's Assignee, (Ky.) 53 S. W. 288;

Henry v. Rutland etc. Co., (Vt.) 27 Vt. 435;

Shackleford v. New Orleans, (Miss.) 37 Miss. 202 (at p. 209);

Ten Eyck v. Pontiac etc. R. R. Co., (Mich.) 3 L. R. A. 378 (and footnote);

Toponce v. Corinne etc. Co., (Utah) 6 Utah 439; 24 Pac. 534 (as affirmed by Corinne etc. Co. v. Toponce, supra);

Taussig v. St. Louis etc. Ry. Co., (Mo.) 65 S. W. 969 (at 4 and col. 2, pp. 970 et seq.);

Railroad Co. v. Sage, (Ill.) 65 Ill. 328;

Edwards v. Fargo & So. Ry. Co., (Dakota) 4 Dak. 549;

Brown v. Creston Ice Co., (Iowa) 85 N. W. 750;

New Orleans etc. Co. v. Brown, (La.) 36 La. Ann. 138; 51 Am. Rep. 5;

Bartlett v. Mystic River Corp., (Mass.) 151 Mass. 433;

McDowall v. Sheehan, (N. Y.) 13 N. Y. Supp. 386;

Outterson v. Fonda Lake Paper Co., (N. Y.) 20 N. Y. Supp. 980;

Wood v. Lost Lake Mfg. Co., (Ore.) 23 Ore. 20; 37 Am. St. Rep. 651;

Bassett v. Fairchild, (Calif.) 132 Cal. 637; 52 L. R. A. 611; 64 Pac. 1082 (at 1084); 61 Pac. 791 (same case);

Chandler v. President etc. Monmouth Bank, (N. J.) 13 N. J. L. 255 (Green's Reports, Vol. 1);

Flynn v. Columbus Club, (R. I.) 21 R. I. 534 (at p. 536);

Watts v. West Va. So. R. Co., (W. Va.) 48 W. Va. 262.

We thus find the English or common law rule—the so-called "strict" rule, modified out of existence in this country, and the so-called "liberal" rule adopted and followed in practically every state in the Union where our investigation of the books discloses any decisions extant upon the subject,—and saving in the State of Pennsylvania, which last named state flies in the face of the United States Supreme Court and the unbroken unanimity of the Courts of the other states referred to,—and appears to still adhere to the "strict" or English rule.

Althouse v. Cobaugh Colliery Co., (Pa.) 76 Atl. 316.

The case of Taussig v. St. Louis & K. Ry. Co., supra, declares that an officer or director may recover on implied contract for such services:

> "when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood."

To same effect we cite:

Deane v. Hodge, supra;

Fitzgerald etc. Construct. Co. v. Fitzgerald, supra.

The other cases cited, supra, are also to the same effect.

Our understanding is that in the case at bar plaintiff in error relied upon the English or strict rule, and proceeded upon the theory that an officer or director cannot under any circumstances recover for services on implied contract or in the absence of prior express agreement, either by charter provision, by-law or proper resolution; that all services rendered by an officer or director are presumed to be voluntary and gratuitous, and further that his authority to act, his agency in fact, must be evidenced by written memorandum. In this connection, as well as upon other points involved in the case at bar, the opinion of the Court in

Santa Clara Mg. Assn. v. Meredith, supra,

is important.

The Court says:

> "If a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required by, his duties as president, or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise."
>
> "Agency for a corporation is not required to be shown by a resolution of the board of di-

rectors or other written evidence, but it may be inferred from facts and circumstances."

"All the prayers of the appellant asked instructions that plaintiff was not entitled to recover unless the jury should find an express contract of employment of the plaintiff by the defendant. We have shown that his employment may be inferred from facts and circumstances, and the appellant's prayers *were* therefore *properly rejected.*"

"There were facts and circumstances in evidence from which the jury were at liberty to infer that the appellee was employed by the appellant in respect of obtaining a patent for the lands. * * * There is evidence in the record tending to prove that these services were either authorized by the corporation previously to their rendition, or were ratified by it after they were performed, and that they were such services as were not required of the appellee in the discharge of his duties *as a director—all these matters were left to the finding of the jury* * * * and if found in his favor he was entitled to recover a reasonable compensation for his loss of time and for services rendered."

Also the expressions of the Court in its opinion in

Bassett v. Fairchild, supra,

on which, with the case of Althouse v. Cobaugh Colliery Co., supra, the plaintiff in error largely relies. In the Bassett v. Fairchild case, the Court (at p. 1084, 65 Pac.) says:

"But respondents contend that under the general law, established by judicial decisions, there can be no lawful allowance to an officer of a corporation for services, no matter what their character and value, where the amount of the

compensation *had not been fixed prior to the rendition of the services.* * * * Most of the authorities cited by respondents *merely* declare the rule that *a director as such,* without some previous understanding, is not entitled to pay for services which are within the ordinary duties to be expected of him as director, * * * for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing", citing

Fitzgerald & M. Constr. Co. v. Fitzgerald;

Rogers v. Hastings etc. Ry. Co.;

Henry v. Rutland etc. Co.

Also the opinion of the Court in Deane v. Hodge, supra, as follows:

"A man has a right to render a voluntary service * * * without remuneration, and if he does he cannot afterwards recover for such services, * * * but it does not follow that his mere neglect to demand a specific agreement for compensation * * * necessarily deprives him of the right to a reasonable remuneration * * *. Where the evidence fails to disclose an express agreement or understanding, the law may imply a contract from the circumstances or acts of the parties; and where there is nothing from which a contrary intention or understanding is to be inferred, it is a just and reasonable presumption that he who has received the benefit of the services * * * of another impliedly undertakes to make compensation therefor."

Also the Court's statement in Shackleford v. New Orleans etc. Ry. Co., 37 Miss. 202, supra (at page 209), to wit:

> "Unless there is some agreement or understanding, express or implied, to the contrary, the law will imply a contract on the part of such company with their agent, whether he be a director or a stranger, that he shall receive for such service in the business of such agency whatever compensation he reasonably deserves to have therefor. And on proof of the value of his services, *the jury should find accordingly.*"

And in New Orleans etc. Co. v. Brown, supra, viz.:

> "The groundwork of plaintiff's argument is that jurisprudence has settled the rule that directors and other officers of corporations * * * are presumed to act gratuitously and cannot claim a salary on the theory of an implied contract.
>
> "But it must not be presumed that the rule is absolute in all cases; some exceptions must be recognized, especially where the duties to be performed are onerous or toilsome. The *services* of the *managing director* of a corporation * * * must be conceded to be of that class."

Also in

> Gumaer v. Cripple Creek etc. Co., (Colo.) 90 Pac. 81, supra,

where the Court says, quoting from Corinne etc. v. Toponce (supra):

> "Under the later and better reasoned cases, for such services,—that is, services performed by a director clearly outside of his duties as

such director, and *in the nature of* the *duties of a general manager or superintendent,*—a recovery may be had either under an express or implied contract.

"For services clearly outside a director's duties, *as a director,* we think there may be a recovery as upon quantum meruit, and in accordance with what * * * is denominated the 'more liberal rule'."

These cases go to the extent of holding the direct opposite of the rule contended for by plaintiff in error, and declare that in the *absence* of contract or express agreement evidencing that such services were understood and agreed to be gratuitous, such officer or director may recover, and on evidence of the value of such services "the jury should find accordingly",—also that services in the nature of those performed by a manager, managing director, superintendent, are clearly outside the scope of a *director's duty as such director.*

—[illegible] of the "as-

As to what the understanding was as to character of service to be rendered see Rec. 250.

## Re: Assignments of Error.

### OBJECTIONS TO CONSIDERATION HEREIN OF ASSIGNMENTS REGARDING COURT'S INSTRUCTIONS TO JURY.

Preliminarily, we object to this Honorable Court's considering those so-called assignments of error

which have to do with the instructions given by the lower Court, being assignments numbered XVIII and XIX (Record, pp. 358-359) and No. XXIII (Record, p. 362), upon the ground and for the reason that no proper or other exception was taken, as required by the rules of Court, to the instruction set forth in assignment numbered XIX, and no exception whatever was taken, as required by the rule or otherwise, to the instructions set forth in assignments numbered XVIII and XXIII, and in support of our statement and contention in this behalf we respectfully refer the Honorable Court to Record page 345 and Record page 346, whereon are found the only exceptions taken to the instructions given by the Court, to wit:

"Mr. THAYER. Perhaps I am over-nice about "the wording, but I would like the benefit of an "exception to that instruction" (Record, p. 345). (Reason for exception given on Record, p. 346.)

This exception referred to the instruction set forth in assignment of error numbered XIX.

There were no other exceptions taken, either as required by the rule or at all, to the instructions of the Court or to those particular instructions set forth in assignments of error numbered XVIII and XXIII, the only other exception being found on Record page 346 to the refusal of the Court to give such of defendant's requested instructions as were declined. For these reasons, we respectfully submit that plaintiff in error is not in law or under the

rules or practice of this Court entitled to have said assignments of error considered.

Circuit Court Rule 22.

> "The cases are uniform to the effect that the appellate Court will not permit a party to lie by without calling the attention of the trial Court to the particular errors in law complained of, and then for the first time seek to take advantage of it in a Court of review."
>
> Ruby Chief Mg. & Mllg. Co. v. Prentice, supra.

The rule is salutary and proper.

ASSIGNMENT NO. I.

The objection of the plaintiff in error to the evidence, the admission of which is complained of in assignment numbered I, was stated to be with the privilege of moving to strike all such evidence after the case is all in (Record, p. 22). No motion to strike was made, as appears by the record.

The statute was suspended in this case by virtue of the acknowledgment of the debt or obligation, made by plaintiff in error on February 15, 1910. (Record, pp. 293-294.)

> "The Courts, without intending to thwart, but rather to give effect to, the true intention of the statute (of limitations) began at an early day to hold that where a debtor expressly promises to pay a pre-existing debt, or *acknowledges its existence* under such circumstances that a *promise to pay* it can be *implied,* the statute is suspended up to that date, and begins to run

anew from the date of such new promise or acknowledgment."

Wood on Limitations, p. 160, Sec. 64.

An acknowledgment of the justice of the claim, without anything more, is sufficient to remove the statute bar.

Bailey v. Bailey, 14 S. & R. (Penn.) 195;
Tichenor v. Colfax, 4 N. J. L. 153.

"The theory upon which the Courts proceed is that the old debt forms a good consideration for a new promise, either express or implied, and that * * * admission of the debt * * * carries with it an implied promise to pay."

Wood on Limitations, p. 162, Sec. 64.

In assumpsit for work and labor, the statute was pleaded; evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar and when a person "up the bay" should come to town he would have the business settled,—held to defeat operation of statute.

Poe v. Conway's Admr., 2 H. & J. (Md.) 307;
Wood on Limitations, p. 166; note to Oliver v. Gray, 1 H. & G. (Md.) 204.

Stating the rule,—and holding that evidence offered to prove acknowledgment is *proper to be submitted to the jury.*

"If more than six years have elapsed since the making of the original promise or since the cause of action accrued, it must appear that the

defendant has made a new promise to pay * * *. Such promise may be express or implied, and a *jury* will be authorized and *bound to infer* such *promise* from a clear, unconditional and unqualified admission of the existence of the debt at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations as a bar."

Sigourney v. Drury, (Mass.) 14 Pick. 390;

Wetzell v. Bussard, 11 Wheat. (U. S.) 315;

Moore v. Bank of Columbia, 6 Pet. (U. S.) 92;

25 Cyc., p. 1325, VIIa.

SERVICE CONTINUOUS.—STATUTE DID NOT BEGIN TO RUN UNTIL SERVICE ENDED, FEBRUARY 15, 1910.

"The instructions asked by the appellant and refused by the Court were to the effect that, if the appellee entered into the service of the decedent and continued therein up to the time of his death, without any special contract as to the terms or worth of the service, or under an agreement that she should be paid the reasonable value of her services, and with no agreement as to the length of time the service should continue, then there could be no recovery by her for more than six years next before the decedent's death. *These instructions were properly refused.* * * * When there is no certain time for payment nor when the service shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services have ended."

Graves v. Pemberton, 3 Ind. App. 71; 29 N. E. 177 (at p. 178).

To same point we cite

Carter v. Carter, 36 Mich. 207.

---

PAYMENT FIXED ON CONTINGENCY PENDING WHICH STATUTE DID NOT BEGIN TO RUN.

The understanding in the case at bar was that defendant in error should be paid for these services upon the happening of a certain event or contingency,—that is to say, when the plaintiff in error had its mill plant completed and equipped and "got " into condition to do it",—"was out of debt and " making money".

(Record, pp. 73, 102, 103, 119 and 120.)

> "Where compensation is not to be made until a certain date, or the happening of a certain event, full compensation may be recovered at law for all services performed prior to that date, as the statute of limitations in such case does not begin to run until the period so fixed."

Cooper v. Colson, 105 Am. St. Rep. 660 (at p. 664); 66 N. J. E. 328; 58 A. 337.

---

WHERE DELAY INDUCED BY DEFENDANT, STATUTE DOES NOT RUN.

The delay in insisting upon payment for the services rendered by defendant in error was induced by plaintiff in error, its officers, president and agent,—and defendant in error relied upon this inducement. (Record, p. 73.)

"Where the insurer or its agent does or says anything to warrant the assured in *believing* that his claim will be settled, and which induces him to delay bringing an action, the insurer cannot allege breach in that respect. But the circumstances must have been such as fairly to induce delay and as would operate as a fraud upon the part of the insurer to set up such delay in avoidance of liability. Forfeitures are not favored by the law and slight evidence of a waiver will be deemed sufficient."

Wood on Limitations, 3rd Ed., p. 108, Sec. 49; p. 109, Sec. 51.

II.

The grounds of the objection to the evidence complained of (Record, p. 71) in assignment numbered II, were:

1. That there was, at the time the testimony was objected to, no evidence that Charles E. Knox was authorized to employ or to agree with plaintiff for compensation.

In this the plaintiff in error was mistaken, for there was then in the record evidence that Mr. Knox was president and general manager of the company (Record, p. 29, p. 58, pp. 60, 62), and that he had general supervision over the business affairs of the company (Record, p. 61); that Mr. Knox had in charge the employment of all people other than those employed in and about the mine (Record, p. 67); that he either rejected or accepted every contract that was made (Record, p. 69), and later Mr.

Knox testified to the same effect (Record, p. 271; also p. 291).

The testimony, both before and after the admission of the evidence complained of, showed a course of conduct on the part of Mr. Knox as president and general manager of the company, and acquiescence in and acceptance by the company, of all his acts, in the general control of the company and its affairs sufficient to establish the general scope of his authority and its being broad enough to authorize him to contract with Mr. Dunlap for compensation for extra services rendered,—an authority sufficiently shown to entitle Mr. Dunlap to rely on it. Further, it tends to show the understanding of the company with regard to the question of fact as to whether it was expected that Mr. Dunlap should be paid for the extra services claimed, and was therefore admissible as evidence for the jury to consider.

2. That the agreement by Mr. Knox for compensation was void as without consideration and made after the rendition of the services sued upon.

The authorities cited, supra,—all of them,—dispose of the objection that the agreement was void by reason of the fact that defendant in error was an officer and director when the services were rendered.

The evidence shows consideration, in that defendant in error waited and agreed to wait for his com-

pensation until after the company was making money (Record, p. 120). Further, plaintiff in error on cross-examination elicited the same testimony which he complains of (Record, p. 117, p. 120). The Court in its ruling states the rule correctly (Record, pp. 71-72).

III.

The evidence complained of in assignment III was limited by the question, viz.:

Q. "Are you acquainted with and do you have a " knowledge of the value of services in that section " of the country during the time that is embraced in " your complaint?

A. "Yes, sir."

Q. "Services of the character which you have " testified that you rendered during the time em- " braced within your complaint?"

(Record, p. 74.)

There is no objection to the evidence appearing in the record,—and the exception, though not grounded and if it may be dignified as being a proper exception and one that can be considered, appears to have been taken after the evidence complained of was in (Record, p. 75).

Later the question was asked and limited and answered, without objection or exception (Record, p. 75, lines 10 to 17 inclusive). So error, if any, was harmless,—and at all events no legal or proper exceptions were taken to it.

IV.

Objection to the question, the sustaining of which defendant in error complains of in assignment IV, was proper on the ground stated in the objection, viz.: that it was not proper cross-examination (Record, p. 82). There is no direct examination in the record on which such a cross-examination could be properly predicated.

Also that it does not meet any issue in the case. (Record, p. 82.)

V.

There is no basis for this so-called assignment of error No. V, in that the Court changed its ruling sustaining plaintiff's objection to the admission of the portion of the minutes referred to, and same was admitted in evidence and read into the record. (Record, pp. 255-256.)

VI, VII, XXI and XXII.

Assignments of error numbered VI, VII, XXI and XXII are all based upon the same subdivided grounds of error and are therefore in this brief here discussed as one, for the reason that the argument and authorities run identically to each of these assignments and each subdivision thereof.

Subdivisions (1), (2), (3) and (4) of Assignments VI, VII and XXII and (2), (3), (4) and (5) of Assignment XXI, have to do with questions of fact.

*For the Jury:*

To the point that: the question as to whether the services were intra or extra official,—the question as to whether the defendant in error was employed by plaintiff in error to perform such services,—the question whether the parties understood the same were to be compensated,—the question whether there was an implied contract to pay for them: are questions of fact to be submitted to and determined by the jury on the evidence,—we cite:

7 Thompson on Corporations, Sec. 8582;
Henry v. Rutland etc. Co., supra;
Santa Clara etc. Assn. v. Meredith, supra;
Fitzgerald etc. Construction Co. v. Fitzgerald, supra;
Chandler v. President etc. Bank, supra;
Felton v. West Iron Mt. Mg. Co., 40 Pac. 70;
Severson v. Bimetallic etc. Co., supra;
Corinne etc. Co. v. Toponce, supra;
Ruby Chief Mg. & Mllg. Co. v. Prentice, supra.

In the last named case the Court says:

> "The evidence *tends* to show, and so the jury must have found, that the services performed were not such as devolved upon the plaintiff * * * *as a director,* but were clearly outside thereof and in the nature of the duties of a general manager * * *.
>
> "Under the later and better reasoned cases, for such services a recovery may be had either under an express or implied contract * * * The testimony being in conflict as to these questions

of fact, we must *accept the verdict of the jury as conclusive.*

"The language of the exception to the charge was as follows:

" 'To the giving of said instructions and each paragraph thereof, said defendant, by its counsel, then and there duly excepted.'

"The cases are uniform to the effect that the appellate Court will not permit a party to lie by without calling the attention of the trial Court to the particular error in law complained of, and then, for the first time, seek to take advantage of it in a Court of review."

---

**Re: Character of Exception.**

"There were facts and circumstances in evidence from which the jury were at liberty to infer that the appellee was employed by the appellant in respect of obtaining a patent for land * * *. There is evidence in the record *tending* to prove that these services were authorized * * * or were ratified * * * and that they were such services as were not required of the appellee in the discharge of his duties *as a director. All these matters* were *left to* the finding of the *jury* * * * and if found in his favor he was entitled to recover * * * compensation."

Santa Clara Mg. Assn. v. Meredith, supra.

"We think that the Court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have

been held as matter of law, that he was not so entitled."

Fitzgerald & M. Constr. Co. v. Fitzgerald, supra.

"It was the peculiar province of the jury * * * to determine from the evidence whether or not he was entitled to compensation. * * *

"The jury having found for the plaintiff * * * and the judge who heard the case in the Court below having refused to set the verdict aside, the Court refuses to disturb such verdict."

Corinne etc. Co. v. Topence (U. S.), supra.

The *agency* may be inferred from facts and circumstances.

Ten Eyck v. Pontiac etc. Co., supra (and footnote);

3 Thompson on Corporations, Sec. 4387 (last part of p. 3228).

The motion for an instructed verdict was made at the close of the evidence of and the resting of his case by the defendant in error (Record, p. 147).

To the point that the refusal of the Court to grant the motion for an instructed verdict for the reason that the plaintiff in error had not rested its case when the motion was made, but afterwards went on and proceeded to introduce evidence in its own behalf,—and submitting that it is conclusive on the point, we cite:

Mo. Pac. R'd Co. v. Charless, 7 U. S. App. 359 (at p. 376).

We submit that these questions were properly left to the jury and that the Court committed no error in denying the motion of plaintiff in error for a directed verdict, as assigned in assignment of error No. VI (Record, pp. 351-352).

---

NONSUIT WOULD HAVE BEEN IMPROPER.

To the point that the motion by plaintiff in error (assignment of error No. VII, Record, p. 353) for nonsuit was properly denied we cite:

> Cases last cited, supra, and particularly
> Felton v. West Iron Mt. etc. Co., supra;
> Corinne etc. Co. v. Topence, supra;
> Severson v. Bimetallic etc. Co., supra.

In the last mentioned case the Court says:

> "The evidence also *tended* to show that it was *understood by the corporate officers* that these were services that should be paid for by the corporation, * * *. The Court therefore *erred in granting* the *nonsuit,* as there was evidence *tending* to prove all the material allegations of the complaint."

In

> Mo. Pac. R'd Co. v. Charless, 7 U. S. App. 359,

at p. 375 of opinion, the Court, speaking by Mr. Justice Hawley, says:

> "When the plaintiff had closed his testimony and rested his case, counsel for the defendant moved the Court for an order * * * for the nonsuit of plaintiff." * * *

> "It has been repeatedly decided by the Supreme Court that Courts of the United States have no power to order a peremptory nonsuit against the plaintiff's will." (Citing U. S. cases.)

The foregoing situation was precisely the same as obtained in the case at bar.

We therefore submit that order of nonsuit would have been improper.

Subdivision (5) of assignments VI, VII and XXII, and (6) of assignment XXI, are ambiguous for in that it by inference suggests that defendant in error was at all times mentioned in his complaint under an agreed salary, which was paid to him,—while the answer of plaintiff in error and the evidence is that he was under such agreed salary only as secretary and treasurer and only until February 21, 1905, and thereafter received no salary,—and further ambiguous in that it assumes what the evidence was as to the right of defendant in error to recover compensation for services extra-official. This was the province of the jury to determine. The subdivision (5) has no merit.

Subdivision (6) of assignments numbered VI, VII and XXII and (7) of assignment XXI, also falls under the same rules as are applied in the argument, supra, regarding subdivisions (1), (2), (3) and (4),—also argument, supra, regarding assignment numbered I; also under the general rule and authorities as applied and cited, supra, re right

of officer and director to recover on implied assumpsit, as upon quantum meruit for extra-official services.

It also was for the jury to determine as a fact, under all the evidence.

VIII.

There is no basis for this so-called assignment VIII, in that the record shows (Record, p. 187) that in law the exception was nullified and withdrawn by the Court's statement that before the ruling became final it would like further information on the exception, and counsel's statement that he would reach it in another way. The Court will take judicial notice of the fact that assessments are a matter of written record, and the record here discloses no attempt to justify non-production of the written record of this assessment, or certified copy thereof, so as to justify admission of secondary oral evidence in the premises. Defendant in error did "reach it in another way". Mr. Lynch, one of its witnesses, testified on the same subject (Record, pp. 238 et seq).

IX.

There is no basis for this so-called assignment of error No. IX.

The evidence to which the question was directed was brought out on cross-examination, by plaintiff in error, of the witness Dunlap (Record, p. 99, pp. 112-113), and under elementary principles and rules

of evidence could not be rebutted by plaintiff in error in his evidence in chief. The Court correctly stated the law in his ruling (Record, p. 247).

X and XI.

The Court committed no error in admitting in evidence (Record, p. 292) the portions of the resolution (Record, pp. 293-294) adopted by the plaintiff in error and appearing in its minutes, as complained of in assignments numbered X and XI.

As is truly said in the opinion of the lower Court (Record, p. 372), denying the motion of plaintiff in error for new trial:

> "The resolution as admitted was no more than an admission by the Board of Directors that plaintiff had rendered certain extra official services, for which he was entitled to some compensation. These were clearly admissions of fact, made because defendant believed them to be true."

And we reiterate and cite on this point the authorities cited by the Court (Record, pp. 372-373), to the effect that "the admission of any distinct fact " made eo animo is competent, though made in the " course of proceedings for compromise".

2 Chamberlayne on Evidence, Sec. 1452 (at p. 1840.

The exception to this evidence was taken upon the ground, inter alia, that it was "for the purpose of compromise" (Record, p. 132).

(The other grounds of exception are disposed of by argument and authorities, supra.)

As to the exception on ground that it was "for purpose of compromise", we quote:

> "Should it appear doubtful as to whether a certain statement or offer is, on the one hand, a compromise offer, or, on the other, an admission of the existence of an independent fact, the presiding judge is justified in leaving the whole matter to the jury under appropriate instructions."
>
> 2 Chamberlayne on Evidence, Sec. 1454; also Sec. 1449 (at p. 1836),

to effect that such an admission is a proper question for the jury.

> "An unconditional assertion is receivable without any regard to the circumstances which accompany it."
>
> 2 Wigmore on Evidence, Sec. 1061 (at top p. 1230, et seq.).

> "It would follow then, * * * if a plain concession is in fact made, it is receivable, even though it forms part of an offer to compromise."
>
> 2 Wigmore on Evidence, Sec. 1061 (top p. 1232).

> "If therefore the statement is absolute, so far as it appears, it is not saved by any cabalistic phrase (such as 'without prejudice', etc.) nor by its occurrence in the course of compromise negotiations."
>
> 2 Wigmore on Evidence, Sec. 1061 (at bottom p. 1232).

> "Judges, affecting that phrase, seem inclined to give little weight to the general hypothetical nature of discussion attending a compromise—negotiation, and to admit every statement not in itself distinctly conditional."
>
> 2 Wigmore on Evidence, Sec. 1062 (at p. 1239).

We point the fact that there is no reservation or condition attached to the concession or admission as contained in the resolution.

> "But where an offer (to compromise) has been grounded upon an express admission of a fact, and that fact afterwards comes to be controverted between them, there seems to be no ground on which the evidence of the offer can be excluded."
>
> Sanborn v. Neilson, 4 N. H. 501 (at p. 509).

In support of this rule that an admission made without reservation during compromise negotiations is receivable in evidence, we cite:

> Kutcher v. Love, 19 Colo. 542 (at 544); 36 Pac. 152;
>
> Scales v. Shackleford, 64 Ga. 170 (at p. 172),

and the many authorities cited by

> 2 Wigmore on Evidence, Sec. 1062, Note 1.

---

To the point that this resolution was *some* evidence *tending* to show that it was the sense and understanding of the parties that the services sued

upon were without the scope of the official duties of the defendant in error; also tending to show the relation of the parties and that they understood plaintiff was to be paid, we also cite, in addition to the foregoing authorities:

> McCarthy v. Mt. Tecarte Land & Water Co., 43 Pac. 956.

See also, at page 958, col. 1,

> Barstow v. City R. Co., 42 Cal. 465.

In

> Illinois Central R. R. Co. v. Manion, 101 Am. St. Rep. 345,

the Court says (at p. 347):

> "If it is an independent admission of fact, merely because it is a fact, it will be received, and even an offer of a sum by way of a compromise of a claim *tacitly* admitted is receivable, unless accompanied with a caution that the offer is confidential."

As said by the Court in Snodgrass v. Branch Bank at Decatur, 60 Am. Dec. 505:

> "Proof that plaintiff had made a proposition in writing to the Decatur Bank to compromise his indebtedness * * * was competent as *tending* to show the existence of an indebtedness at that time by the party making the offer."

The same character of evidence is contained in the resolution adopted by and appearing in the minutes of the plaintiff in error under date February 2d, 1905, to wit:

"His (Mr. Dunlap's) management of the *entire* "*business* of the company, *in addition to the affairs* "*of his own office,* * * * and for his * * * "expeditious services in attention to matters con- "nected with securing patent for the company's "mines. During the past year we have had one "serious accident * * * might have resulted in "damage suit against the company * * * but for "the * * * adjustment *effected entirely through* "the good offices of *Mr. Dunlap.*" (Record, p. 29.)

XII.

Assignment of error numbered XII may well be passed without comment, in view of the fact that the instruction referred to WAS GIVEN by the Court in *todidem verbis* (Record, p. 338).

XIII.

The Court did not err in declining to give the instruction demanded by plaintiff in error as set out in assignment numbered XIII. Such an instruction would have been an improper statement of the law, as evidenced by the authorities already cited herein.

XIV.

This assignment of error may also be passed as not correctly stating the law. (Authorities heretofore cited).

XV.

Comment on assignment of error numbered XV is unnecessary, as the instruction referred to WAS

GIVEN *in todidem verbis* by the Court (Record, p. 339).

XVI.

For the same reason as last given we pass assignment of error numbered XVI. It WAS GIVEN, *in todidem verbis* (Record, p. 340).

XVII.

We make no comment upon assignment of error numbered XVII, for the reason that the principles and rules of law applying in connection with this assignment were fully discussed in the argument to assignment of error numbered I, supra.

XVIII.

We here renew our objection supra to any consideration by the Court of assignment of error numbered XVIII, upon the ground as hereinbefore stated, that no proper exception, and *no exception whatever,* was taken, as required by Circuit Court Rule 22, or otherwise or at all, to this instruction by the Court (Record, pp. 345-346).

We submit, however, that the instruction as given was a correct statement of the law.

XIX.

We make the same renewal of our objection supra to the consideration of assignment numbered XIX, viz.: that no proper exception was taken to same as required by Rule 22 Circuit Court and the practice

of the Court. And we further submit that this instruction was correct in law and is uniformly supported by the great weight of authority (cases cited, pp. 8 & 10, this brief).

XX and Subdivision 1 of XXI.

Referring to the question of excessive damages, assigned as error in assignment No. XX and subdivision 1 of number XXI, the only evidence in the case regarding the value of services such as were rendered by defendant in error, at the time he rendered same, is that such services were, at that time, compensated at the rate of from $200 to $800 a month (Record, p. 27). True, Mr. Knox (Record, p. 264, p. 290) testified that he thought Mr. Dunlap's services were of no value and at times detrimental. But the self-serving nature of this evidence is plainly apparent in the light of the resolutions (Record, pp. 28-29 and Record, pp. 293-294) adopted by and appearing in the minutes of plaintiff in error.

The question of the value of the services of defendant in error was one of fact to be determined by the jury. The services, extra-official, extended over a period of seven years, January 15, 1903, to February 15, 1910; the only evidence as to the value of such services is, as stated (Record, p. 75), that they were worth from $200 to $800 a month. At $200 a month for the 85 months the result would be $17,000, at $800 a month $68,000. The defendant in error ceased to draw an agreed or any salary on his resignation as secretary and treasurer on February

21, 1905; from then until February 15, 1910, 60 months, at $200 a month the result would be $12,000, at $800 a month $48,000. Conceding for the purpose of argument that which we deny as a matter of law, viz., that the statute of limitations began to run in this case, as contended by plaintiff in eror, on February 15, 1906, the intervening 48 months to February 15, 1910, would, at $200 a month, result in $9600, at $800 a month $38,400, and at the average, $500 a month, $24,000.

The jury found for defendant in error and fixed the value of the services at $7500. In the light of the facts and the evidence there does not appear to be any passion or prejudice or excessive damages involved in the amount awarded by the jury as the value of the services which it found had been rendered. It was less than any possible computation under the direct evidence. It was a question for the jury. If there be conflicting evidence on the question of the value of these services, the Court will not disturb the jury's verdict, and if there be no evidence to the contrary of the value found, it certainly presents less reason for disturbance.

To the effect that the Court has *no power on writ of error* to consider whether the verdict of the jury was excessive as to damages, we cite:

St. Louis &c. Co. v. Spencer, 36 U. S. App. 229;

New York L. E. & W. R. Co. v. Winter, 143 U. S. 60 (at p. 75).

## XXIII.

We here renew our objection to any consideration of alleged error assigned as No. XXIII, upon the ground, as hereinbefore stated, that there was no proper or other exception, and in fact *no exception whatever,* to the instructions referred to in this alleged assignment, either in accordance with Circuit Court Rule 22 or in compliance with general rules of practice. We further object to its consideration upon the ground and for the reason that it does not comply with the spirit of Rule 11 of this Court, in that, as to that portion quoted, viz.: "In segregating un- " official from official services, you will consider all " the testimony in the case," it does not set out the instruction in full, but merely an excerpt, without giving the other portions of the charge to which that excerpt referred and with which it was interwoven (Record, p. 335).

Aside from this objection to its consideration, however, the instruction, as to the portion above quoted, taken as it must be, if considered at all, with the remainder of the charge of which it is a part, as also the excerpt of instruction quoted in the remainder of this so-called assignment, taken as it must be, if considered at all, with the remainder of the charge of which it is a part (Record, p. 336), correctly states all phases of the law applicable, and for the same reasons, and under the same authorities, as given, argued and cited in the comments in this brief, supra, directed to the general issue, as

also the argument specially directed to assignments of error numbered X and XI.

This brief was completed and copy delivered to the printer prior to the service of the brief of plaintiff in error.

An examination of the latter brief discloses that a large portion of it is given over to a so-called "statement of facts",—largely argumentative as to the character of the evidence, the deductions to be drawn and conclusions to be reached from it, and its general materiality and weight; and far beyond the limits set by the rule as to errors *assigned* for the admission or non-admission of evidence.

The major portion of the "argument" in the brief is similarly given over to a discussion of the weight of the evidence and the conclusions to be reached from it, and plaintiff in error fails to confine itself in its brief to the evidence for the admission or rejection of which error has been assigned, or upon which error can here be predicated; and which, we submit, therefore, will not be here considered by the Court as to what it does or does not establish, either as matter of fact or law.

As we understand the practice, the only questions to be considered on writ of error are the exceptions, the admission or rejection of evidence, and the charge of the Court and its refusal to charge.

> "It may be that if we were to *usurp the functions of the jury* and determine the weight to be given the evidence, we might arrive at a

different conclusion. But *that is not our province on a writ of error.* In such a case *we are confined to* the *consideration* of *exceptions,* to the *admission* or *rejection* of *evidence,* and to the *charge of* the *Court and* its *refusal to charge.* We have *no concern with questions of fact or the weight to be given to the evidence* which was properly admitted."

New York L. E. & W. R. Co. v. Winter, 143 U. S. 60 (at p. 75).

With the *Pennsylvania cases* as practically the *only exception,* as we have heretofore in our brief pointed out,—we find on examination of the cases and authorities cited in the brief of the plaintiff in error,—as the Court will find on investigating same, —that they in no wise modify or change the principles laid down on the general issue as established by the cases cited in our brief, and that, in their exceptions to those principles, they are all capable of construction supporting the case at bar and the cases in this brief cited by us.

Indeed most of them support us in our views of the case at bar on various points involved and we take pleasure in citing, among the cases cited by plaintiff in error:

National Loan & Investment Co. v. Rockland, 94 Fed. 339 (at p. 338),

where the Court says:

"But such *officers who have rendered services under an agreement,* either express *or implied,* with the corporation, *its owners or representatives,* that they shall receive reasonable but in-

> definite compensation therefor, *may recover* as much as their services are worth,—*and it is not beyond the power of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.*"

The foregoing opinion also holds that *whether* there is an *implied agreement with the representative* of the corporation *is for the jury to decide.*

To same effect see:

> Red Bud Realty Co. v. Smith, 131 S. W. 340 (cited by plaintiff in error).

The other authorities cited by plaintiff in error go to the main point that *an officer as such* cannot be voted or paid or sue for and obtain a salary except upon prior express agreement by charter provision, by law or appropriate resolution, which proposition of law is not disputed by us. It was upon this point that the following cases cited by plaintiff in error turned, viz.:

> Wood & Sons Co. v. Schaefer (suit for salary of president, *as such*);
>
> Doe v. N. W. Coal & Trans. Co. (suit for salary of president, *as such*);
>
> Gaul v. Kiel &c. Co. (suit for salary of officer, as such).

The same question is discussed in the other cases cited (except Pennsylvania) by plaintiff in error, and the opinions support the principle that the *service can be recovered for on implied assumpsit where* they are *extra official.*

To the point that the agreement may be made with the *representatives* of the corporation (Mr. Knox, for instance, as the president and general manager), and that the president and general manager has implied power and authority to make same, we cite the following cases cited by plaintiff in error:

> Swedish American Bank v. Kobernick, 117 N. W. 1021 (at top col. 1, p. 1022);
>
> Deal v. Inland Logging Co., 100 Pac. 157,

in which the Court says:

> "Services performed under circumstances" (to raise the presumption) "that it was well *understood by* proper *corporate officers* as well as by himself that the services were to be paid for."

> Doe v. N. W. Coal & Trans. Co., 78 Fed. 62,

in which the Court says:

> "The president and the secretary of a corporation are vested with implied power to execute its negotiable paper."

We ask, then, is not the president and general manager, who "made all contracts" for the company, vested with implied power to agree for the company for payment of the services of an employee?

Latourette v. Weldrum, cited by plaintiff in error, was reversed because a charge was given on an issue not made by the pleadings, and not on incompetent evidence.

Pyper v. Salt Lake Am. Assn., cited by plaintiff in error, was a *case of estoppel* of plaintiff to claim salary for the reason that his *company* when *insolvent conducted a reorganization* scheme for *payment of all its debts,* in which reorganization he participated and was silent as to any debt to him.

The other cases cited by plaintiff in error, including the Pennsylvania cases, are, in so far as they differ from the principle that extra-official service may be recovered for on assumpsit, flatly in contradiction to the decisions of the U. S. Supreme Court and the great weight of current authority.

As to the authority of Mr. Knox, as president and general manager, to employ and agree for payment of such services,—we further cite:

2 Cook on Corp., 6th Ed., Sec. 716 (p. 2277), reading that:

> "His (president's) authority may arise from his having assumed and exercised power in the past."

And Sec. 716 Id. (pp. 2289-90):

> "In all cases the president binds the corporation by his acts and contracts * * * when he has been permitted by the corporation for some time to act and contract for it."

The defendant in error respectfully submits that there are no errors on the face of the record and that none of the questions of law raised by the

plaintiff in error in the record herein, and none of the alleged errors assigned, can be maintained; that the motion for a directed verdict was properly overruled; that the motion for non-suit was properly denied; that the trial Court properly refused to grant the motion of plaintiff in error herein for a new trial, and that the verdict found herein and the judgment herein entered thereon should stand.

Respectfully submitted,

McIntosh & Cooke,
C. H. McIntosh,
H. R. Cooke,
*Attorneys for Defendant in Error.*